

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
ATLANTA BRANCH OFFICE

AMBASSADOR SERVICES, INC.

and

INTERNATIONAL LONGSHOREMEN'S
ASSOCIATION, LOCALS 1922 AND 1359, AFL-CIO

Cases 12-CA-26758
12-CA-26759
12-CA-26832

and

ERIC SWANSON, Party in Interest

Christopher C. Zerby, Esq., for the General Counsel.
Daniel M. Shea and Matthew T. Gomes, Esqs., for
the Respondent.
Neil Flaxman, Esq., for the Charging Party.

DECISION

Statement of the Case

GEORGE CARSON II, Administrative Law Judge. This case was tried in Cocoa Beach, Florida, on June 8 and 9, 2011, pursuant to a consolidated complaint that issued on March 31, 2011.¹ The complaint alleges that the Respondent violated Section 8(a)(1) of the National Labor Relations Act (the Act) in several respects and Section 8(a)(5) of the Act by refusing to recognize and bargain with the Union and making certain unilateral changes. The answer of the Respondent denies any violation of the Act. I find that the Respondent violated the Act substantially as alleged in the complaint.

Eric Swanson is named as a party in interest because he filed a decertification petition that is blocked by the charges herein.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following

¹ All dates are in 2010, unless otherwise indicated. The charge in Case 12-CA-26758 was filed on June 3. The charge in Case 12-CA-26759 was filed on June 3 and was amended on July 6, August 11, and November 2. The charge in Case 12-CA-26832 was filed on August 12.

Findings of Fact

I. Jurisdiction

5 The Respondent, Ambassador Services, Inc, the Company, is a Florida corporation with
 an office in Cape Canaveral, Florida, engaged in providing stevedoring services at Port
 Canaveral, Florida. The Respondent annually purchases and receives goods valued in excess
 of \$50,000 directly from points outside the State of Florida. The Respondent admits, and I find
 10 and conclude, that it is an employer engaged in commerce within the meaning of Section 2(2),
 (6), and (7) of the Act.

 The Respondent admits, and I find and conclude, that International Longshoremen's
 Association, Locals 1922 and 1359, AFL–CIO, the Union, is a labor organization within the
 meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

A. Prefatory Note

20 On August 26, 2011, the Board issued its decision in *URC-UNICCO Services Co.*, 357
 NLRB No. 76 (2011). That decision returns to prior Board precedent, *St. Elizabeth Manor, Inc.*,
 329 NLRB 341 (1999), with modifications, and precludes a successor employer from
 withdrawing recognition from an incumbent union for a “reasonable period of time.” The Board
 25 held that it would apply its decision in *URC-UNICCO Services Co.* retroactively in representation
 proceedings but noted that the “question of retroactivity in the context of an unfair labor practice
 proceeding” was not presented. *Id.* slip op. at 8. As hereinafter discussed, I find that the
 withdrawal of recognition herein was predicated upon a tainted petition and that the Respondent
 30 did not establish that a majority of the unit employees did not desire representation insofar as an
 insufficient number of the signatures on the petition were authenticated, thus the issue of
 retroactivity in the context of this unfair labor practice proceeding is not presented. Insofar as my
 findings should be altered by any reviewing authority, the issue of retroactivity in an unfair labor
 practice proceeding would be presented.

B. Background

35 The Union was initially certified as the exclusive bargaining representative of the
 longshoremen (porters) who receive and transfer luggage and provisions onto and out of Disney
 Cruise Line vessels at Port Canaveral on March 22, 2002.² The Union has been recertified three
 40 times, on August 6, 2003, July 19, 2007, and November 18, 2008, following decertification
 elections. Despite its election victories, the Union never obtained a collective-bargaining
 agreement with the predecessor employer. The two local Unions are jointly certified. Local 1359
 represents longshoremen, and Local 1922 represents clerks and checkers.

45 On or about March 27, 2010, Ambassador Services obtained the service contract with
 Disney Cruise Lines (Disney) and replaced the predecessor, Florida Transportation Services,

² The appropriate unit is: All full-time and regular part-time porters/longshoremen employed by
 Respondent who receive and transfer luggage and provisions on to and out of the cruise
 vessels operated by DCL [Disney Cruise Lines] at Port Canaveral, Florida, excluding all other
 employees, office clerical employees, managerial employees, guards and supervisors as
 defined in the Act.

Inc. (FTS). The Company hired a majority of the employees who formerly worked for FTS, and it admits that it is successor under *NLRB v. Burns Security Services*, 406 U.S. 272 (1972). Randall May is one of the three owners of Ambassador Services. His son, Donald May, is vessel supervisor of the Disney operation. The unit employees are referred to as porters.

Ambassador Services also provides stevedoring services to cargo vessels at Port Canaveral and did so prior to its obtaining the Disney service contract. Those separate operations have no connection to the issues herein, although I note that some unit employees also perform stevedoring work on cargo vessels served by Ambassador when a Disney ship is not in port.

In May 2010, the relevant time period herein, only one Disney ship was operating from Port Canaveral. It arrived at 6 a.m. and departed at 5 p.m. on Thursdays and Sundays. The intervening hours were "controlled chaos" in which garbage from the prior cruise was unloaded, new provisions were loaded, approximately 2750 passengers and a crew of 1300 disembarked, and approximately 2750 new passengers and a new crew came onto the ship. The baggage of departing passengers was removed and reunited with the appropriate owners. The baggage of arriving passengers was screened by x-ray and delivered to the appropriate cabins on the ship.

The porters were assigned to teams of about eight employees, and each team had a lead employee, referred to as a header. In May 2010, the total employment complement was 38, which included vessel supervisor, Donald May, porter supervisor, J. D. Martin, and dock supervisor, Christopher Justice. Employee Robert Ford recalled that, at that time, there were four teams. Martin recalled that there were five. One team was assigned x-ray, the other teams to unloading garbage and loading provisions and unloading and loading the luggage of the passengers. The porters loaded the luggage into cages which elevators brought to the appropriate deck where the porters distributed it to the appropriate cabins. In the afternoon, the curb team greeted arriving passengers. The teams rotated so that no team performed the exact same work the next ship day. As Martin testified, the "porters know what they have to do."

The Company was unaware that the employees of FTS were represented. On May 19, counsel for the Union, Neil Flaxman, wrote and sent by facsimile copy a letter to Ambassador advising that it had come to the attention of the Union that Ambassador was servicing Disney. The letter demands recognition and that Ambassador bargain with the Union.

The day after the Company received the demand for recognition from the Union, Donald Bartlett, a former employee of FTS who had not been hired by Ambassador, went to a parking lot in which Company employees parked, and he distributed copies of the May 19 letter that demanded recognition of the Union. Donald May observed him doing so and questioned a Port Authority security guard about the distribution. There is no claim or allegation that any attempt was made to stop the distribution.

On June 2, counsel for the Company responded to Attorney Flaxman. The letter states that the first occasion upon which the Company became aware of "any potential union affiliation" of the former FTS employees was when the Company received the letter dated May 19. The letter notes that "individuals representing your client were handing out copies" of the May 19 letter "last week" and that, thereafter, the Company had received a petition "signed by 75%" of the employees stating that "they do not wish representation." The letter concludes by stating that the Company "declines to recognize" the Union.

The central issue herein is whether the Company was privileged to refuse to recognize and bargain with the Union. Subsidiary issues include alleged 8(a)(1) violations that the General Counsel asserts taint the petition and the supervisory status of J. D. Martin.

C. Supervisory Status of J. D. Martin

J. D. Martin served as a police officer with the Royal Canadian Mounted Police for 34 years. He began working for the predecessor, FTS, in 2002. His title was leadman. He voted in all three decertification elections. His job title with Ambassador is porter supervisor. Martin credibly testified that, when he began working for Ambassador, his job duties did not change. He drove a forklift, moving luggage and other items, 80 percent of the time.

Many of the employees who testified, when authenticating their signatures on the petition, named Martin as one of their supervisors. I have no doubt that they perceived him to be a supervisor in view of his over 8 years experience with the Disney operation as an employee of the predecessor and his demeanor consistent with his prior employment as a police officer. Some employees did not identify Martin as a supervisor. "It is well-settled that, absent evidence of the existence of one of the primary indicia of supervisory status, secondary indicia are not dispositive." *Pacific Coast M.S. Industries*, 355 NLRB No. 226 slip op at 2 fn. 13 (2010).

The Respondent argues that, if Martin is not a supervisor, the ratio of supervisors to employees would be "unreasonable." If the work being performed by these employees was more complicated than moving the luggage of passengers, I might well agree. Even when the work involved is more complicated than moving luggage, the Board has held that a general foreman over foremen of subgroups, in this case the teams, each of which has a header, is not a supervisor absent a showing that he exercises statutory supervisory authority. *Clock Electric, Inc.*, 338 NLRB 806, 825-826 (2003). Admitted supervisor May is present throughout the day.

Martin credibly denied that he possessed or exercised the authority to hire, discharge, transfer, suspend, promote, reward, or adjust the grievances of the porters. There is no probative evidence to the contrary, nor is there any evidence that he had the authority to lay off or recall an employee.

There is also no evidence that Martin had the authority to assign employees. The Board, in *Oakwood Healthcare, Inc.*, 348 NLRB 686, 689 (2006), held that the term "assign" referred to "designation of significant overall duties . . . not to the . . . ad hoc instruction that the employee perform a discrete task." The porters are divided into teams, and the uncontradicted testimony of Martin establishes that May makes the team assignments and sets the calendar days showing which team would be performing which work on which day. Martin does not "assign."

Discipline was administered by Donald May. Martin acknowledged that he did have authority relative to minor discipline, such as directing an employee to display his or her nametag to comply with Disney's uniform standards. Such verbal admonishments do not establish authority to discipline. *Capri Sun, Inc.*, 330 NLRB 1124, 1131 (2000). Donald May testified that his father, Randall May, told Martin that, if he saw someone "not working in the Disney fashion," to "send them home" and "pull Donnie [May] over there if you need to." Randall May did not testify, thus the record reflects what Donald May recalled, not what Randall May actually said. Martin, when asked what he would do if an employee refused to comply with the Disney dress code, answered that he would "[t]ake it to Donnie May." There is no probative evidence that Martin had authority to send anyone home for disciplinary reasons. May testified that Martin twice sent an employee home because the employee was sick. Sending a sick employee home does not establish supervisory authority. *Webco Industries*, 334 NLRB 608, 610 (2001). The only evidence of purported discipline issued by Martin was his verbally reprimanding an employee for being disrespectful to another employee. He reported the incident to Donald May who stated that he would follow up. Martin prepared no document relating to the incident. Verbal admonishments that are not placed in personnel files and do not result in

adverse action do not constitute discipline. In this case, as in *Capri Sun, Inc.*, 330 NLRB supra at 1132, “the lead’s role in the process is simply reportorial and does not constitute authority to discipline or recommend discipline.” The absence of authority of Martin to discipline was confirmed by employee Tamara Kelley who testified regarding Martin, “He doesn’t write people up.” Employee Robert Ford, when asked whether Martin had authority to discipline, answered,

May recalled that, when he hired Martin, he told him that he was “the supervisor,” that he would be “in charge when I’m not there” and that, since Martin knew “more than I know” about the operation, he would look for his “recommendations on how to do things.” Neither Martin’s title as porter supervisor nor his being told that he was in charge for the brief periods of time that May was absent, such as when he went to lunch, establishes supervisory authority. *St. Louis Auto Parts Co.*, 315 NLRB 717, 720 at fn. 2 (1994). May’s reliance upon Martin to educate him regarding “how to do things” relates to Martin’s familiarity with the operation, not supervisory authority over employees. May consults Martin, but May makes the decisions. May, when addressing recommendations made to him by Martin, answered, “I follow them. You know, I respected his opinion . . . I follow pretty much . . .” The revision of May’s answer to “pretty much” as it was being given confirms that Martin did not effectively recommend. For instance, May abolished the early release roster used by the predecessor pursuant to which, if work permitted, some employees were permitted to leave early. Martin gave advice and opinions when requested to do so. May made the decisions. Seeking the advice or opinion of an experienced employee does not invest that employee with supervisory authority.

The determination of whether Martin exercises statutory supervisory authority rests upon a determination of whether he has the authority “responsibly to direct” employees using “independent judgment.” Martin acknowledged that if the porters got backed up loading the ship that he would consult with May and then “pull a couple people off the x-ray and reassign them to the ship” to assist. Asked whether he would take it upon himself to do that if May was not present, Martin answered, “Yes.” Martin explained that his choice of who would be asked to assist depended upon availability, “[w]ho is standing in close proximity” and their job assignment for the day. Employee Robert Ford confirmed that “the work is generalized” and, if assistance was needed somewhere, Martin “would select whoever was available.”

Counsel for the General Counsel questioned Martin regarding assisting disembarking passengers on deck 3. Martin explained that there were two escalators and that, when the passengers began disembarking, porters lined up on either side. If Martin was advised that an unforeseen problem had occurred with regard to a guest and luggage he would “normally go and ask . . . the first person . . . if they wish to go up to Deck 3 to go up and retrieve the luggage and also the guests. If they reply in a negative answer, I will ask the other side first person in that list. And unless it becomes very cumbersome or time consuming, some person either volunteers or I will go myself.”

The foregoing evidence establishes Martin does direct employees to perform ad hoc tasks. The evidence does not establish that the foregoing direction requires the exercise of independent judgment. In *Oakwood Healthcare, Inc.*, 348 NLRB supra at 692, fn. 38, the Board noted that responsible direction with independent judgment involves exercising “significant discretion and judgment in directing’ others.” The Board pointed out that actions “of a merely routine or clerical nature” do not involve independent judgment and gave as examples situations in which there is only one obvious choice or situations in which the workloads needed to be equalized. *Id.* at 693.

It is incumbent upon the party with the burden of proof to adduce “concrete evidence

showing how assignment decisions are made.” *Franklin Home Health Agency*, 337 NLRB 826, 830 (2002). “The assignment of tasks in accordance with an Employer’s set practice, pattern or parameters, or based on such obvious factors as whether an employee’s workload is light, does not require a sufficient exercise of independent judgment to satisfy the statutory definition [of a supervisor].” *Ibid.* The Respondent offered no evidence contradicting Martin’s testimony that his selection of employees to perform a discrete task was based upon the availability of the employee or employees chosen. There is no evidence that Martin’s actions involved “significant discretion and judgment.”

Even if it is assumed that Martin’s direction of employees to perform ad hoc tasks, such as assisting coworkers when baggage got backed up, constituted responsible direction, there is no evidence that the foregoing direction required the use of independent judgment.

The burden of establishing supervisory status is upon the party asserting that status. The Respondent has not met that burden. The evidence does not establish that Martin responsibly directed exercising independent judgment. Martin was a strawboss. May made the decisions. Martin was not a supervisor and should not be denied the protections of the Act.

D. Procedural Matters

At the hearing, when the rule relating to sequestration was invoked, counsel for the General Counsel designated J. D. Martin as his representative. Counsel for the Respondent did not raise any objection or claim that Martin was a supervisor of the Company. Following Martin’s direct testimony, counsel for the Respondent stated that Martin was a supervisor and that the Region had acted improperly in the investigation by not advising counsel that Martin was being spoken with.

Following the completion of the examination of Martin, counsel for the General Counsel withdrew his designation of Martin as his representative under the sequestration rule. The General Counsel moved to amend the complaint to allege that, in the event Martin was found to be a supervisor, he solicited employees to sign the decertification petition. The proffered amendment was predicated upon Martin’s testimony that, when employees asked him about the petition, he stated that “if they felt their job was being threatened and they required or need a paycheck to keep a roof over their head, food on their table, that they should up and sign the petition. It would be resolved at a later date through lawyers.”

Counsel for the Respondent objected to the amendment and referred to “sanctionable misconduct” relating to the failure of the Region to advise counsel that Martin was being spoken with. Counsel for the Charging Party, at the hearing, pointed out that “the purpose of the Act is to do what’s right for the employees and not to try it on a technical basis.” I advised that I would hold my ruling on the amendment in abeyance.

In its brief, the Respondent requests that all testimony of Martin be stricken and, as a sanction, that the complaint be dismissed. I deny that request.

Martin was not a supervisor. Thus, the motion to amend the complaint is denied.

E. The 8(a)(1) Allegations

1. Work rules

The Company maintains an Employee Safety & Environmental Handbook that applies to

all employees. The complaint alleges that two of the rules were unlawfully broad.

The first, a no-solicitation rule, prohibited:

5 Unauthorized solicitation and/or distribution of literature, services or products.

Violation of the foregoing rule, classified as a Class II infraction, generally called for the issuance of a final disciplinary warning.

10 There is no evidence of enforcement of the rule, and it was rescinded on or about July 30, following the filing of the charge in Case 12–CA–26759. Despite the absence of any evidence of enforcement, “the mere existence of a broad no-solicitation rule may chill the exercise of employees’ [Section 7] rights.” *Alaska Pulp Corp.*, 300 NLRB 232, 234 (1990), citing *NLRB v. Beverage-Air Co.*, 402 F.2d 411, 410 (4th Cir. 1968). The Respondent, by maintaining
15 an unlawfully broad rule prohibiting all solicitation on company property without authorization, violated Section 8(a)(1) of the Act.

The second rule relates to leaving the worksite. It prohibited:

20 Walking off the job and/or leaving the premises during working hours without permission.

Violation of the foregoing rule was a class III infraction, which generally results in discharge, or, in certain circumstances, the issuance of a final disciplinary warning.

25 The General Counsel cites *Crown Plaza Hotel*, 352 NLRB 382, 387 (2008), a summary judgment case decided by the two sitting Board Members who found that employees would “reasonably read” the rule as requiring permission before engaging in Section 7 activity. The Board distinguished *Wilshire at Lakewood*, 343 NLRB 1050 (2005), in which the Board had held such a rule valid, noting that those employees worked in a nursing home and would read the
30 rule in the context of their need “to ensure adequate care” for the patients.

The Respondent, citing *Jury’s Hotel Boston*, 356 NLRB No. 14, slip op. at 17, (2011), and the rationale therein, argues that the rule does not infringe upon the statutory right of employees to engage in protected concerted activity. Furthermore, the Respondent points out
35 that the rule is justified by security concerns. Thus, if a weapon or explosive device is discovered by the baggage x-ray, a “code red” is issued, at which time a headcount of all personnel is made.

40 The rule makes no mention of strikes or other protected Section 7 activity. As in *Wilshire at Lakewood*, the Respondent presented a business justification for the rule. I cannot conclude that any employee would reasonably read the foregoing rule as nullifying the right to strike guaranteed by Section 13 of the Act. I shall recommend that this allegation be dismissed.

2. Conduct by Donald May

45 The complaint contains several allegations relating to conduct by May.

Subparagraph 9(a) alleges that May interrogated employees about their union sympathies. The uncontradicted testimony of J. D. Martin establishes that May mentioned that he had received “correspondence from the Union,” an apparent reference to the May 19 demand for recognition. May then asked Martin, “where I stood.” Martin replied that he “attended all the union meetings and that I wished to remain informed in the event that

there was a vote and that my vote would not be influenced by either a company spokesperson or a union spokesperson, that I would make up my own mind.”

5 I find no coercion in the foregoing exchange. Although an employee’s subjective reaction to a question is not dispositive regarding whether the question constitutes coercive interrogation; it does provide a context for evaluation of the circumstances. Martin’s forthright response reveals that he did not consider the inquiry by May to be coercive. No threat was made. “To hold that any instance of casual questioning concerning union sympathies violates the Act ignores the realities of the workplace.” *Rossmore House*, 269 NLRB 1176, 1177 (1984).
10 I shall recommend that this allegation be dismissed.

Subparagraph 9(b) alleges that May told employees that the Respondent “had assisted in the circulation of a petition to decertify the Union.”

15 The foregoing allegation is predicated upon the testimony of employee Brian Postmus. Postmus, when reporting to work on May 27, had received from Donald Bartlett the letter from the Union requesting recognition. Shortly after lunch that day, employee Eric Swanson approached Postmus and requested that he sign the petition. Postmus did not sign. Later that day Postmus informed Vessel Supervisor May that Swanson had approached him and
20 rhetorically questioned “it was a coincidence that the letter had come out the same day that Don [Bartlett] handed me that paperwork.” May responded, “[I]t was no coincidence. Eric [Swanson] and I had been working on it for a couple of weeks.” Further testimony by Postmus confirms that the “letter” to which he referred was the petition. Postmus referred to the document that Swanson asked him to sign as “[t]he letter that . . . Eric [Swanson]
25 gave to me at lunchtime after lunch.”

May specifically denied the foregoing comment. He recalls that Postmus spoke with him at the end of the workday on May 27, stating that Swanson had asked him to sign “a decertification petition,” and that he did not sign it. He asked whether that would affect his
30 employment. May said, “[N]o, . . . if Eric is passing around [a] decertification petition, it has nothing to do with your job security.” [Emphasis added.] May says that he told Postmus “[I]f you want to sign it, sign it. If you don’t, don’t.” Postmus inquired about additional work, and May informed him that the Company had a “full operation on the south side of the port” and that he could put him in touch with the Company’s controller who could tell him
35 what kind of positions “we are looking for.”

I credit Postmus. May knew that Swanson was passing out a decertification petition and therefore would not have predicated his response with the word “if.” When Postmus mentioned a “coincidence,” May spontaneously acknowledged his involvement, that he and Swanson “had
40 been working on it [the decertification petition] for a couple of weeks.” The relevant ship days herein were Thursday and Sunday, May 20, 23, 27, and 30. May 19 was the week before May 27, thus the reference to a “couple of weeks” was perfectly logical.

By informing employees that the Respondent had assisted in the preparation of a petition to decertify the Union, the Respondent violated Section 8(a)(1) of the Act.
45

Subparagraph 9(c) alleges that May “permitted employees to circulate a petition to decertify the union . . . during working time in working areas in his presence, thus coercing employees to sign the petition and coercively polling employees about their union sympathies.”

In midafternoon on May 27, as employee Robert Ford and several other employees were moving to a new luggage cage, Eric Swanson approached them with regard to the petition

that he was circulating. Ford stated that he was not interested in signing it. Near the end of the workday, as the employees were preparing to leave, Ford was leaning against a work table. The table, a luggage table, was about 3-1/2 or 4 feet high. Donald May was on the other side of the table, about 6 feet away, doing paperwork. Swanson was sitting on an adjoining table. He spoke to Ford, saying, "[I]f you are not going to sign the petition, will you at least read what it says." May stood up and moved to a nearby table. Ford asked where the petition was and then saw it was on the table against which he had been leaning and at which May had been sitting. Ford read the petition and signed it. He was unaware whether May observed him sign. He explained that it "was a little intimidating when somebody calls you out in front of a boss," and that he "probably" would not have signed it otherwise, noting that he did not sign "the first time he [Swanson] asked me."

Swanson testified that he did not remember, but that it "wasn't like the three of us were together." May testified that he did not see either Ford or Swanson, that he was busy with other employees, his telephone, or something else.

I credit Ford. Nevertheless, mere presence at a location at which signatures upon a decertification petition are being solicited, without more, does not violate the Act. *Saginaw Control & Engineering, Inc.*, 339 541, 566 (2003). Although May learned that Ford had previously refused to sign the petition, that information came from Swanson. Insofar as the no-solicitation rule in existence at that time was overly broad, if May had interrupted and invoked the rule, the complaint herein might well have included an additional 8(a)(1) allegation. There is no evidence that, although on the clock, either Swanson or Ford was supposed to be doing anything other than preparing to go home. I shall recommend that this allegation be dismissed.

Notwithstanding my dismissal of this allegation, May's movement to an adjoining table rather than leaving the area suggested tacit approval of Swanson's solicitation.

Subparagraph 9(d) alleges that May on May 27 and May 30 "solicited employees to sign a petition to decertify the Union." May, although claiming to have had no involvement with regard to the decertification petition, twice requested Martin to sign it. On May 27, May asked Martin if he wished to sign the petition. Martin responded that he felt, "as supervisors we should remain neutral." Martin's response, citing supervisory neutrality, is immaterial insofar as the evidence establishes that he was not a supervisor as defined in the Act. On Sunday, May 30, as he and May were preparing to leave the terminal, Martin testified that May asked again if he wished to sign, and he "pulled the paper out the, out of his backpack." Martin said, "[S]ure," and signed and dated his signature. May denied that he solicited any employee to sign the petition but did not address Martin's credible testimony. By soliciting employees to sign a decertification petition, the Respondent violated Section 8(a)(1) of the Act.

Paragraph 12 alleges that, on or about July 30, the Respondent instructed employees to report union activity to the Respondent, threatened that the Respondent would cause individuals distributing union literature to be removed from a parking lot owned by Canaveral Port Authority, and instructed employees not to solicit or distribute literature at work or on the Respondent's premises. The foregoing allegations relate to comments allegedly made by May when he informed employees that the Company had revised the unlawfully broad no-solicitation rule.

Martin recalled that, at a group meeting on July 30 in which May announced the changed solicitation rule, he specifically mentioned Don Bartlett, stating that "if Don Bartlett is in the parking lot, if you wish to take the correspondence from him you may . . . and bring it in to me. Or if you don't wish to up and speak with him, you don't have to. Let me know,

and . . . I will have him removed, have Don Bartlett removed from the parking lot.”

May denied instructing employees to report union activity or threatening removal, but he did not address Martin’s testimony. There is no evidence that Bartlett was distributing
 5 “correspondence” in late July. Although I find that Martin was generally credible, the absence of corroboration by any other employee at the July 30 group meeting regarding any comment by May regarding reporting union activity or removing Bartlett compels the conclusion that Martin was mistaken regarding any such comments being made on July 30. There is no allegation or
 10 evidence that the comments Martin attributed to Donald May were made on a different date. I shall recommend that the allegations regarding instructing employees to report union activity and threatening removal be dismissed.

Employee Dan Schmidt was working when the July 30 meeting occurred. As he was preparing to leave work, May spoke with him. May stated that “there is not going to be any
 15 more soliciting,” there would be “no more handing out anything that applied to anything at all, even the Union.” Schmidt replied, “I can go to the parking lot or to the bar at the beach and talk about anything I want.” May said that “the main thing is on the property right there, not to talk about anything.” He then had him sign for copies of the revised rules.

Although May denied informing any employee that solicitation or distribution was prohibited, he did not address the specific testimony of Schmidt. When Schmidt referred to talking at a bar, May replied that the “main thing is on the property right there, not to talk about
 20 anything.” That reply suggests that May, notwithstanding the new rule, did not understand the distinction between distribution in working areas and solicitation on working time. I credit Schmidt. The Respondent, by informing an employee that solicitation and distribution on the
 25 property upon which the Respondent worked was prohibited, violated Section 8(a)(1) of the Act.

F. The Petition

Eric Swanson, who filed the decertification petition, circulated a petition with the
 30 following heading: “PETITION FOR DECERTIFICATION (RD) -- REMOVAL OF REPRESENTATIVE.” The wording of the petition was as follows:

The undersigned employees of _Ambassador Services, Inc._ (employer name) do not
 35 want to be represented by _ILA Local 1922 and/or ILA Local 1359_ (union name). Should the undersigned employees make up 30% or more (and less than 50%) of the bargaining unit represented by _ILA Local 1922 and/or ILA Local 1359_ (union name), the undersigned employees hereby petition the National Labor Relations Board to hold a
 40 decertification election to determine whether a majority of employees no longer wish to be represented by this union. Should the undersigned employees make up 50% or more of the bargaining unit represented by _ILA Local 1922 and/or ILA Local 1359_ (union name), the undersigned employees hereby request that _Ambassador Services, Inc._ (employer name) withdraw recognition from this union immediately, as it does not enjoy the support of a majority of employees in the bargaining unit.

45 Swanson testified regarding his motivation in circulating the petition:

I had worked for FTS for I believe around six years, and they had been, you know, dealing with the Union I just kind of wanted to see where everybody felt, you know, we got a new company come [in], and I know that the Union was involved with the previous company, and they couldn't really do anything for us So I just kind of wanted to find out where everybody stood, you know, we had some new

employees come in So I wanted to see, you know, the opinions had changed or, you know, just kind of find out what, you know, the census was, you know, of the employees. If they were for it or against it or, you know, if they still wanted them to be our bargaining agent or, you know, that kind of stuff.

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When asked whether the distribution by former employee Bartlett of the letter demanding recognition "influenc[ed]" him, Swanson answered that he "was already kind of in the middle of it." Insofar as Swanson had taken no action at that point, the response suggests that something other than Swanson individually conducting a "census" was occurring.

10

Swanson testified that he obtained the wording for the petition from a website on the internet, but was uncertain which website. He admitted that "maybe I went back on another website." The Respondent's brief attaches website documents that were not introduced at the hearing and are immaterial insofar as Swanson's testimony that he went to some website was not contradicted. What is not explained is why Swanson went to a website and obtained the wording for a decertification petition in the first place insofar as he purportedly simply "wanted to see" whether "opinions had changed." He could have satisfied his claimed personal curiosity by conducting a straw poll. The evidence suggests that May directed Swanson to the website that contained the decertification petition that he circulated.

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When questioned regarding his conversations with employees when circulating the petition, Swanson testified, "I just presented it and they signed it, and other people I said, like, oh, it's this, and I said, you know, *just decertify it*, kind of find out, you know, what people want." [Emphasis added.] Swanson did not explain how a census to find out "what people want" became a request to "decertify it."

25

Swanson acknowledged that, when questioned as to whether May knew "what you are doing, what's up" when he was circulating the petition, he would reply that May knew "what's going on, yeah, he was aware."

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May himself informed the employees that he was aware of the petition. Two of the Company's witnesses, when authenticating their signatures on the petition, recalled that, on May 27, the day they signed the petition, Donald May spoke with a group of employees near the end of the day. Employee Tracy Hance recalled that May told the employees that the "Union stuff is on, and there's a petition here, you know. If you want decertification, just to let you know it's here. You know, we are not pushing you either way. You know, make your own decision for it." Hance was corroborated by employee Shane Lee who recalled that, on the day he signed the petition, May mentioned that "they didn't like . . . having anybody . . . trying to get in between him . . . and the employees." Lee recalled that May "never told us that we had to do anything. He just said, this is how I feel. You guys do what you want and, you know, it doesn't make a difference to me."

35

40

May's testimony that his comments related to the Company response to the charges subsequently filed by the Union was not credible. Hance and Lee were clear that the comments were made on May 27, the day that each of them signed the petition. The message that May communicated was not vitiated by his informing the employees to make their own decision. May's message was clear. As Martin explained to employees who asked him, if they wanted to keep a roof over their head and food on their table, they "should up and sign the petition."

45

Several employees who signed the petition were not solicited by Swanson. Employee Kyle Dampier, whose signature is the first on the petition, found it "sitting on the table" in midmorning when he was coming back from break. The table upon which the petition was lying

was the “table where all the paperwork is at throughout the whole day Pretty much everything that tells you where you where you are going to be working at is on that table.”

5 Chester Dampier, when signing out on May 30, asked where the petition was and then saw it on the table with other paperwork, “the manager’s paperwork for when everything starts and stops is there. The sign-out sheets for your time.” Dampier claims not to have noticed that the name immediately above where he signed was that of Donald May. I do not credit that portion of his testimony.

10 Tracy Hance found the petition on a table “about three tables over” from the table upon which the employees’ worksheets are kept. Steve Collins found the petition lying on a table upon which there was nothing else. Tamara Kelley found the petition on a table with a pen and paper. She recalled that “[e]verybody just kind of knew it was there.”

15 Both May and Swanson deny that the Company was involved in the decertification effort. May claims that, when Swanson informed him of his intention to circulate the petition, he told him that he “thought it was a great idea and to go for it.” He says he also explained that, being in a management position, “I cannot have anything to do with it.” Swanson claims, consistent with May’s testimony, that May informed him that he could not be involved. I do
20 not credit the testimony of either May or Swanson relating to the absence of involvement by May. May testified that Swanson asked him to sign the petition and that he did so. Swanson gave the petition to May. If May had no involvement, there would have been no reason for Swanson to have given the petition to him. May solicited Martin to sign the petition. May informed the employees that a decertification petition was being circulated.

25 If, as he testified, Swanson “wanted to see . . . [what] the census was,” he could have taken a notepad and recorded the responses of his fellow employee or circulated a piece of paper relating to the Union, “yes or no.” His circulation of a formal decertification petition rather than an informal census is persuasive evidence that Respondent’s management was involved
30 and that Swanson was “in the middle of it.” He testified that, on May 30, he gave “it [the petition] to Donnie [May] because I said I wasn’t going to even get the signatures.” Swanson was not asked what he meant with regard to the foregoing cryptic comment. Insofar as he had already obtained 23 signatures, it would appear that he was telling May that he was unable to get any more signatures. The critical evidence is that he gave the
35 petition to May. Contrary to Swanson’s testimony that the Company was not involved and that he simply wanted to conduct a census, Swanson circulated a petition providing for decertification or withdrawal of recognition that he provided to May after he had obtained all of the signatures that he was able to obtain.

40 Direct evidence relating to initiation of the petition by the Respondent is the testimony of employee Brian Postmus. As already discussed, I credit Postmus that, when he mentioned the petition being a coincidence, May spontaneously informed him that “[i]t was no coincidence. Eric [Swanson] and I had been working on it for a couple of weeks.”

45 *G. The 8(a)(5) Allegations*

1. Refusal to recognize and bargain

An incumbent union enjoys a continuing presumption of majority status, and a successor employer is obligated to recognize and bargain with the union absent evidence that that the union no longer enjoys majority support. An employer may withdraw recognition from an incumbent union or, in the case of a successor employer, refuse to recognize and bargain with

the union only if the “the expression of employee desire to decertify represents ‘the free and uncoerced act of the employees concerned.’” *SFO Good-Nite Inn, LLC*, 357 NLRB No. 16, slip op. at 1 (2011).

5 The Board, in *SFO Good-Nite Inn, LLC*, pointed out that *Hearst Corp.*, 281 NLRB 764 (1986), is the applicable precedent “when an employer has engaged in unfair labor practices directly related to an employee decertification effort, such as ‘actively soliciting, encouraging, promoting, or providing assistance in the initiation, signing, or filing of an employee petition seeking to decertify the bargaining representative.’ In those situations, the employer’s unfair labor practices are not merely coincident with the decertification effort; rather, they directly instigate or propel it. The Board therefore presumes that the employer’s unlawful meddling tainted any resulting expression of employee disaffection, without specific proof of causation, and precludes the employer from relying on that expressed disaffection to overcome the union’s continuing presumption of majority support.” *SFO Good-Nite Inn, LLC*, supra, slip op. at 2. [Citations omitted.]

15 The Board specifically held that an “employer’s commission of unfair labor practices assisting, supporting, encouraging, or otherwise directly advancing an employee decertification effort taints a resulting petition,” and that, because of the taint, the petition “is per se insufficient to rebut the presumption of continuing majority status.” *Id.*, slip op. at 3.

20 Although Swanson only wanted to “kind of find out . . . the census” regarding support for the Union, once the demand for recognition was made he found that he “was already kind of in the middle of it.” Neither Swanson nor May acknowledged their collaboration regarding the decertification petition; however, May’s statement to employee Postmus, that “Eric [Swanson] and I had been working on it for a couple of weeks,” establishes that there was collaboration and that a decertification petition, rather than a census, was instigated by the Respondent.

25 On the morning of May 27, the petition was lying on the table that contained the “the manager’s paperwork for when everything starts and stops,” the table upon which paperwork that “tells you where you where you are going to be working” is placed. I am mindful that there is no direct evidence that May was aware that the petition was on that table, but its presence suggests that Swanson had permission to place it there.

30 Near the end of the day, May, who claimed that he could not be involved, informed employees that the “Union stuff is on, and there’s a petition here, you know. If you want decertification, just to let you know it’s here.” He then commented that he “didn’t like . . . having anybody . . . trying to get in between him . . . and the employees.”

35 May remained nearby when Swanson, for the second time, solicited employee Robert Ford to sign the petition. Although May’s conduct did not violate the Act, it reflected tacit approval of the decertification effort.

40 On May 30, notwithstanding May’s claimed noninvolvement, Swanson gave the petition to May because he “wasn’t going to even get the signatures.” May signed the petition. Employee Dampier’s signature and name appear directly under that of May, and I have not credited his testimony that he did not notice the name immediately above his when he signed the petition. May asked Martin to sign the petition, although Martin had previously refused to do so. I have found that the foregoing solicitation violated the Act.

45 The petition herein was tainted insofar as it was instigated by the Respondent. May

informed employees of his involvement in the instigation of the petition, and he solicited Martin to sign the petition. Although not violative of the Act, May encouraged employee support of the petition by informing them of the existence of the petition and the Respondent's tacit approval of it. The Respondent's actions "tainted any resulting expression of employee disaffection." A
 5 tainted petition reflecting employee disaffection with a union may not be relied upon to justify a withdrawal of recognition or a refusal to recognize and bargain. The Respondent, by failing and refusing to recognize and bargain with the Union, violated Section 8(a)(5) of the Act.

2. Unilateral changes

10 The complaint alleges that the Respondent violated the Act by unilaterally altering the no-solicitation and leaving the premises rules. There is no evidence that the unlawfully broad no-solicitation rule was enforced. There is no allegation or claim that the revised rule,
 15 promulgated after a charge challenging the unlawful rule was filed, is unlawful. There is also no evidence that the revised rule has been enforced. The leaving the premises rule was changed to: "Leaving the job or premises during working time without notice." The revised rule is not alleged as being unlawful. There is no evidence that any employee was affected by either of the foregoing changes. The changes did not result in a "material, substantial, and significant" change in a term of employment" of the unit employees. *Fresno Bee*, 339 NLRB 1214, 1215–
 20 1216 (2003). I shall recommend that these allegations be dismissed.

H. Majority Status

25 I am mindful that no analysis relating to majority status is applicable in cases where the expression of employee disaffection with a union is tainted by the involvement of management. Nevertheless, insofar as any reviewing authority should alter my finding that the decertification petition was tainted, it is appropriate to note that the Respondent did not establish that a majority of employees in the unit signed the decertification petition.

30 The Board, in *Levitz Furniture Co. of the Pacific*, 333 NLRB, 717, 725 (2001), held that an employer withdraws recognition or, in this case, refuses to recognize an incumbent union, "at its peril." If "the union contests the withdrawal . . . the employer will have to prove by a preponderance of the evidence that the union had, in fact, lost majority support." *Ibid*.

35 The Board, in *Flying Foods*, 345 NLRB 101, 103 fn. 9 (2005), noted that that an employer's withdrawal of recognition is not unlawful where the employer does not verify the authenticity of the signatures on a disaffection petition before withdrawing recognition. Nevertheless, the decision therein, consistent with *Levitz*, confirms that, if the withdrawal is
 40 challenged, the ultimate determination relating to objective evidence justifying withdrawal of recognition because of a loss of majority status does require that the signatures upon a disaffection petition be authenticated. *Id.* at 103-104. The logic therein is indisputable. A union, seeking to obtain a bargaining order after having its support undermined by unfair labor practices, is required to establish, generally by authorization cards, that a majority of the employees in the unit signed the card without coercion or any misrepresentation regarding the
 45 purpose of the card. Signatures may be authenticated by the testimony of the signer, a witness to the signature, delivery to the solicitor of the card, or by handwriting exemplars that sometimes involve the testimony of an expert witness. The standard should be no different when an employer seeks to establish the loss of majority of an incumbent union.

Respondent's Exhibit 13 reflects that, in May, there were 38 individuals working under the Disney service contract, including Donald May and J. D. Martin, both of whom signed the petition. The Company presented no evidence that dock supervisor Christopher Justice, who did

not testify and who did not sign the petition, was a statutory supervisor. Of the 38 individuals working on the contract, 26 signed the petition, but that number includes admitted supervisor Donald May as well as J. D. Martin, whom I have found was an employee.

5 In addition to May and Martin, the signatures of 18 employees who signed the petition were authenticated. The Respondent did not authenticate the signatures of six employees: Dana Davis, Dan Dombroski, Michael Fiore, Curtis Jeffers, Bradley Riggs, and Jacob Vega. The General Counsel's brief lists 5 unauthenticated signatures, but it inadvertently omits the unauthenticated signature of the Dombroski.

10 Vessel Supervisor May is not in the unit. Martin was not a supervisor. Thus the unit consisted of 37 employees. Martin's signature was coerced insofar as it was solicited by May and should not be counted. The remaining 18 authenticated signatures do not constitute a majority of the unit.

15 If, contrary to my finding, Martin were found to be a supervisor, the unit would consist of 36 employees. The 18 authenticated signatures do not constitute a majority of the unit of 36.

20 Thus, in either circumstance, the Respondent did not establish that a majority of the employees in the unit did not desire to continue to be represented by the Union.

Conclusions of Law

25 1. The Respondent, by maintaining an unlawfully broad rule prohibiting unauthorized solicitation and/or distribution of literature, informing employees that it had assisted with a petition to decertify the Union as its employees' collective-bargaining representative, soliciting employees to sign a petition to decertify the Union, and informing employees that they could not solicit or distribute literature on the property at which they were working, violated Section 8(a)(1) and Section 2(6) and (7) of the Act.

30 2. The Respondent, by failing and refusing to recognize and bargain with the Union, violated Section 8(a)(1) and (5) and Section 2(6) and (7) of the Act.

Remedy

35 Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

40 The unlawfully broad rule prohibiting unauthorized solicitation and/or distribution has been rescinded, thus no rescission order is necessary.

45 The Respondent, having unlawfully failed and refused to recognize and bargain with the Union must recognize and, upon request, bargain with International Longshoremen's Association, Locals 1922 and 1359, AFL–CIO, as the exclusive collective- bargaining representative of its employees in the appropriate unit.

The Respondent will also be ordered to post and email an appropriate notice.

On these findings of fact and conclusions of law and on the entire record, I issue the

following recommended³

ORDER

5 The Respondent, Ambassador Services, Inc., Cape Canaveral, Florida, its officers, agents, successors, and assigns, shall

1. Cease and desist from

10 (a) Maintaining an unlawfully broad rule prohibiting unauthorized solicitation and/or distribution of literature.

 (b) Informing employees that it had assisted with a petition to decertify the Union as its employees' collective- bargaining representative.

15 (c) Soliciting employees to sign a petition to decertify the Union.

 (d) Informing employees that they could not solicit or distribute literature on the property at which they were working.

20 (e) Failing and refusing to recognize and bargain with the Union.

 (f) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

25 2. Take the following affirmative action necessary to effectuate the policies of the Act.

 (a) Recognize and, on request, bargain with International Longshoremen's Association, Locals 1922 and 1359, AFL–CIO, as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

35 All full-time and regular part-time porters/longshoremen employed by Respondent who receive and transfer luggage and provisions on to and out of the cruise vessels operated by DCL [Disney Cruise Lines] at Port Canaveral, Florida, excluding all other employees, office clerical employees, managerial employees, guards and supervisors as defined in the Act.

40 (b) Within 14 days after service by the Region, post at its facilities in Port Canaveral, Florida, copies of the attached notice marked "Appendix."⁴ Copies of the notice, on forms provided by the Regional Director for Region 12 after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are

45 ³ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

⁴ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by Respondent at any time since March 27, 2010.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. , September 13, 2011.

George Carson II
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT maintain an unlawfully broad rule prohibiting unauthorized solicitation and/or distribution of literature.

WE WILL NOT assist with a petition to decertify the Union as your collective bargaining representative.

WE WILL NOT solicit you to sign a petition to decertify the Union.

WE WILL NOT tell you that you cannot solicit or distribute literature on the property at which you are working.

WE WILL NOT fail and refuse to bargain with the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL recognize and, on request, bargain with International Longshoremen's Association, Locals 1922 and 1359, AFL-CIO, as your exclusive representative in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

All full-time and regular part-time porters/longshoremen employed by Respondent who receive and transfer luggage and provisions on to and out of the cruise vessels operated by DCL [Disney Cruise Lines] at Port Canaveral, Florida, excluding all other employees, office clerical employees, managerial employees, guards and supervisors as defined in the Act.

AMBASSADOR SERVICES, INC.

(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's

5 Regional Office set forth below. You may also obtain information from the Board's website: www.nlr.gov.
201 E. Kennedy Blvd., South Trust Plaza, Suite 530, Tampa, FL 33602–5824, (813) 228–2641,
Hours: 8 a.m. to 4:30 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

10 THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST
NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS
NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S
COMPLIANCE OFFICER, (813)

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